

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRIGHTON COLLECTIBLES, INC.,

Plaintiff,

vs.

RK TEXAS LEATHER MFG; K & L
 IMPORTS, INC.; et al.,

Defendants,

and related cross claims.

CASE NO. 10-CV-419-GPC (WVG)

**ORDER GRANTING IN PART
 AND DENYING IN PART
 PLAINTIFF'S MOTION FOR
 ATTORNEYS' FEES**

[Dkt. Nos. 435, 443.]

Before the Court is Plaintiff Brighton Collectibles, Inc.'s ("Brighton" or "Plaintiff") motion for attorneys' fees. (Dkt. No. 435.) Defendant AIF Corporation ("AIF" or "Defendant") filed an opposition. (Dkt. No. 442.) Brighton filed a reply (Dkt. No. 447.) Based on the parties' briefs, supporting documentation, and the applicable law, the Court GRANTS in part and DENIES in part Plaintiff's motion for attorneys' fees.

Background

Brighton manufactures and sells women's fashion accessories, including watches. Brighton filed this action in February 2010 against RK Texas Leather Manufacturing, Inc. ("Texas Leather") alleging numerous violations of Brighton's intellectual property rights. (Dkt. No. 1.) On December 6, 2010, Texas Leather filed a third party complaint against K & L Import, Inc., NHW, Inc., YK Trading, Inc., JC NY, Joy Max Trading Inc., and AIF Corporation. (Dkt. No. 17.) Subsequently, on

February 28, 2011, Plaintiff filed a first amended complaint (“FAC”) adding the third party defendants. (Dkt. No. 51.) On August 31, 2011, Brighton filed a second amended complaint (“SAC”). (Dkt. No. 87.) As to AIF, the SAC alleged claims solely on copyright infringement. Prior to and at the start of trial, all Defendants settled with Plaintiff except AIF.¹

Beginning October 23, 2013, the Court held a five-day jury trial on Plaintiff’s second amended complaint alleging copyright infringement against Defendant AIF. On October 30, 2013, the jury returned a special verdict in favor of Plaintiff and against Defendant AIF. (Dkt. No. 386.) Specifically, the jury found that AIF infringed upon valid copyrights owned by Brighton. (*Id.*) Out of 51 of AIF’s designs, the jury found infringement for 39 of the designs encompassing 11 out of 14 copyrights alleged against it. (*Id.*) The jury also found that AIF did not engage in copyright infringement willfully. (*Id.*) For damages, the jury awarded Plaintiff \$1,000,000 in lost profits damages. (*Id.*) On December 4, 2013, AIF filed a motion for judgment as a matter of law, and in the alternative, motion for new trial challenging the jury’s lost profits damages award. (Dkt. No. 393.) On May 27, 2014, the Court denied AIF’s motion. (Dkt. No. 417.) On June 24, 2014, AIF filed a motion for reconsideration of the Court’s order denying AIF’s motion. (Dkt. No. 426.) On June 25, 2014, AIF filed a notice of appeal of the Court’s order denying AIF’s motion for judgment as a matter of law, and in the alternative, motion for a new trial. (Dkt. No. 428.) On October 24, 2014, the Court denied AIF’s motion for reconsideration. (Dkt. No. 449.)

Discussion

A. Recovery of Attorney’s Fees

The Copyright Act provides that “the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. The

¹Texas Leather and Richard Ohr filed a notice of settlement on September 6, 2013. (Dkt. No. 281.) Around October 16, 2013, YK Trading settled. (Dkt. No. 348.) October 22, 2013, K&L and NHW settled. (Dkt. No. 359.) Joy Max Trading settled on October 24, 2013. (Dkt. No. 367.)

1 district court has discretion to grant a prevailing party attorney's fees under the
 2 Copyright Act. Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108, 1111 (9th Cir. 2013).
 3 The key factor in determining whether to award fees under the Copyright Act is
 4 whether the award will further the purposes of the Act. Fantasy v. Fogerty, 94 F.3d
 5 553, 558 (9th Cir. 1996). The Act's "ultimate aim is . . . to stimulate artistic creativity
 6 for the general public good." Id. (quoting Twentieth Century Music Corp. v. Aiken,
 7 422 U.S. 151, 156 (1975)).

8 In determining whether to award attorney's fees, the court may consider non-
 9 exclusive factors such as: (1) the degree of success obtained; (2) frivolousness of the
 10 losing party; (3) motivation of the losing party; (4) the objective unreasonableness of
 11 the losing party's factual and legal arguments; and (5) the need, in particular
 12 circumstances, to advance considerations of compensation and deterrence. See
 13 Fantasy, 94 F.3d at 534 n.19; see also Love v. Assoc. Newspapers, Ltd., 611 F.3d 601,
 14 614 (9th Cir. 2010).

15 **1. Degree of Success**

16 Here, it is undisputed that Brighton is the prevailing party. Plaintiff's degree of
 17 success was high since the jury found that AIF sold 39 watch designs out of 51 watch
 18 designs that infringed upon 11 out of 14 copyrighted designs validly owned by
 19 Brighton. The jury awarded Plaintiff \$1,000,000 in lost profits which was significantly
 20 more than the alternate statutory damages of \$330,000 for the infringement. (Dkt. No.
 21 386.)

22 **2. Frivolousness of the Losing Party**

23 While Brighton alleges that AIF's litigation strategy was unreasonable and
 24 conducted in bad faith, the jury found that three copyright designs were not infringing
 25 and three copyright designs were dismissed prior to trial. This demonstrates that AIF
 26 engaged in a vigorous defense. The Court finds that AIF's defense at trial was not
 27 frivolous.

28 // //

1 **3. Motivation of the Losing Party**

2 The Court finds that AIF's motivation in proceeding to trial was to avoid paying
3 or reducing the amount of damages for which AIF could be held liable. As noted
4 above, the Court does not find that the defense offered was frivolous and does not find
5 a malicious motive in driving AIF's decision to proceed to trial.

6 **4. Objective Unreasonableness of the Losing Party's Factual and Legal**
7 **Arguments**

8 Plaintiff argues that the Court should award attorneys' fees because AIF litigated
9 in bad faith and took unreasonable positions in discovery and on the merits which
10 resulted in increased attorneys' fees. During litigation, issues were raised as to late
11 invoices being produced up until a month before trial and questions were raised as to
12 the credibility of Imran Issa, AIF's corporate representative, during his deposition
13 testimony. At his deposition, Issa responded to many questions with "I don't
14 remember" or "I don't know." It was clear that Issa was being evasive. Based on these
15 reasons, the Court permitted Brighton to argue for lost profit damages based on AIF's
16 gross sales. The Court concludes that AIF's unreasonable dilatory conduct was
17 adequately taken into account at trial by the Court's evidentiary rulings.

18 In opposition, AIF argues that Brighton's misuse of the judicial system by filing
19 numerous copyright cases in the Central District of California and now the Southern
20 District of California where Brighton insists on unreasonable, extortionate settlement
21 demands should justify denial of Plaintiff's request for attorneys' fee. It contends that
22 Brighton is "in the business of suing its competitors who are mostly small 'ma-and-pa'
23 retailers and distributors" alleging infringement on designs that have been around
24 forever.² (Dkt. No. 442, AIF's Opp. at 5.) Brighton's abuse of the judicial system is
25 exemplified by Brighton filing another lawsuit against AIF in Los Angeles Superior
26 Court seeking an additional \$2 million dollars for breach of warranty and equitable

27 ²Despite AIF's argument that Brighton's designs are common "Western"
28 ornamentation which have been around forever, the jury found that Plaintiff had valid
copyrights.

1 indemnity which is in addition to the \$1 million Brighton was awarded in this case and
2 without having to prove any damages.³

3 The Court finds that AIF's argument is belied by Brighton's success in this case.
4 Moreover, to the extent that AIF believes that Brighton misuses the judicial system,
5 AIF is free to raise those claims in litigation in the other cases.

6 **5. The Need to Advance Considerations of Compensation and** 7 **Deterrence**

8 AIF also raises the argument that the \$1,000,000 jury award was based on a
9 legally impermissible jury verdict, which was raised in AIF's motion for judgment as
10 a matter of law, and argued again in its motion for reconsideration that the Court
11 rejected. The Court found that due to AIF's late and incomplete disclosure of invoices
12 of sales of the infringing products, Brighton was entitled to provide the jury with a
13 damages range tethered to AIF's total gross sales on all products from 2004-2010, the
14 relevant infringing time period. The jury awarded \$1,000,000, less than 1.8% of the
15 gross revenues of total products. Based on the evidence presented to the jury, the Court
16 found that the \$1,000,000 jury award was not against the "great weight of the
17 evidence" and that the jury had not reached a "seriously erroneous result." (Dkt. No.
18 417 at 14.)

19 While the \$1,000,000 jury award did not warrant a new trial or judgment as a
20 matter of law, the Court concludes that the award constitutes a significant deterrent
21 specifically for AIF and generally for any potential copyright infringer. The question
22 becomes whether the \$1 million award alone provides sufficient deterrence. The Court
23 concludes that an equitable reduction in lodestar, as set out herein, is warranted and
24 will provide sufficient deterrence.

25 **B. Calculation of Attorneys' Fees**

26 Plaintiff seeks attorneys' fees in the amount of \$808,877.00 for 1,815.30 hours

27 ³In this case, Texas Leather and Brighton entered into a settlement agreement
28 prior to trial where Texas Leather assigned its rights to Brighton for indemnification
against AIF, the vendor of some of Texas Leather's infringing products.

1 of work. (Dkt. No. 435, Ross Decl., Ex. 4.) Defendant argues that the fees are
2 unreasonable and excessive.

3 The district court has wide discretion in determining the reasonableness of
4 attorney's fees. Gates v. Deukmejian, 987 F.2d 1392, 1398 (9th Cir. 1992). Attorney's
5 fees are based on the "lodestar" calculation. Hensley v. Eckerhardt, 461 U.S. 424, 433
6 (1983). The Court must first determine a reasonable fee by multiplying "the number
7 of hours reasonably expended on the litigation" by "a reasonable hourly rate." Id.

8 The lodestar figure may then be adjusted to account for reasonableness of the
9 time expended based on a weighing of the following factors: "(1) the time and labor
10 required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite
11 to perform the legal service properly, (4) the preclusion of other employment by the
12 attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is
13 fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8)
14 the amount involved and the results obtained, (9) the experience, reputation, and ability
15 of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the
16 professional relationship with the client, and (12) awards in similar cases." Kerr v.
17 Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975). In subsequent case law, the
18 Ninth Circuit has held that the issue of whether the fee is fixed or contingent is no
19 longer a valid factor to consider in determining reasonable attorney's fees. In re
20 Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 n. 7 (9th Cir. 2011).

21 However, once calculated, the lodestar amount is presumptively the reasonable
22 fee amount. Van Gerwen v. Guarantee Mut. Life Ins., 214 F.3d 1041, 1045 (9th Cir.
23 2000). A multiplier may then be used to adjust the lodestar amount upward or
24 downward only in "'rare' and 'exceptional' cases, supported by both 'specific
25 evidence' on the record and detailed findings by the lower courts" that the lodestar
26 amount is unreasonably low or unreasonably high. Id. (citations omitted).

27 Plaintiff has the burden to establish entitlement to fees and provide supporting
28 evidence. See Hensley, 461 U.S. at 437. The Court may reduce an award based on

1 inadequate documentation of hours or rates requested. Id. at 433. Once the applicant
 2 submits evidence of the appropriate hours spent on litigation, “the party opposing the
 3 fee application has a burden of rebuttal that requires submission of evidence to the
 4 district court challenging the accuracy and reasonableness of the hours charged.”
 5 Gates, 987 F.2d at 1397.

6 **1. Reasonably Hourly Rate**

7 Plaintiff seeks an hourly rate of between \$400 per hour and \$625 per hour
 8 depending on the experience of the particular attorney. Specifically, Plaintiff seeks an
 9 hourly rate of \$625 for its lead counsel, Peter Ross, who has been practicing over 30
 10 years; \$525 per hour for Keith Wesley who has been in practice for 11 years; and \$400
 11 per hour for Benjamin Scheibe, who has been in practice since 1981.⁴ (Dkt. No. 435,
 12 Ross Decl. ¶¶ 3, 4, 5.) Defendant asserts that Plaintiff has failed to bear the burden of
 13 producing evidence that the requested rate is reasonable.

14 To determine the appropriate lodestar amount, the reasonableness of the hourly
 15 billing rate must be assessed. Blum v. Stenson, 465 U.S. 886, 896 n.1 (1984). Courts
 16 look to the prevailing market rates in the relevant community for similar work by
 17 attorneys of comparable skill, experience, and reputation. Camacho v. Bridgeport Fin.,
 18 Inc., 523 F.3d 973, 979 (9th Cir. 2008). Generally, the relevant community is the
 19 “forum in which the district sits.” Id.

20 The moving party has the burden to produce “satisfactory evidence, in addition
 21 to the affidavits of its counsel, that the requested rates are in line with those prevailing
 22 in the community for similar services of lawyers of reasonably comparable skill and
 23 reputation.” Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987).
 24 Affidavits by the plaintiff’s counsel and other counsel concerning the prevailing fees
 25 in the community, and rate determination in other cases, are satisfactory evidence of
 26 the prevailing market rate. United Steelworkers of America v. Phelps Dodge Corp.,

27
 28 ⁴Brighton notes that Benjamin Scheibe who has been admitted to practice since
 1981 billed \$400 per hour in this case even though his standard billing rate is higher.

1 896 F.2d 403, 407 (9th Cir. 1990).

2 Plaintiff presents the affidavit of its lead counsel, Peter Ross, where he provides
3 the education, years of practice and experience of the attorneys seeking a fee award.
4 (Dkt. No. 435.) He also cites to cases supporting the prevailing fee from a few years
5 back closer to the time the complaint was filed in this case. See Brighton Collectibles,
6 Inc. v. Coldwater Creek Inc., 06cv1848-H(POR), 2009 WL 160235, at *4 (S.D. Cal.
7 Jan. 20, 2009) (\$550 per hour for lead counsel with 25 years of experience, and \$625
8 for outside, general counsel's work with 35 years of experience were reasonable);
9 Moore v. Bank of America, N.A. (USA), No. 03cv520, 2008 WL 68851, at *3 (S.D.
10 Cal. Jan. 7, 2008) (\$550 per hour was reasonable in Truth in Lending Act cause of
11 action); Eldorado Stone LLC v. Renaissance Stone, 04cv2562 JM(BEN), 2007 WL
12 3308099, at *4 (S.D. Cal. Oct. 24, 2007) (\$520 per hour was reasonable in copyright
13 and trademark infringement case).⁵

14 AIF argues that Brighton submits a hearsay declaration of Peter Ross and fails
15 to present the qualifications and experience of the other attorneys.⁶ The Court
16 disagrees. The Ross declaration provides a sufficient basis to support the attorneys'
17 reasonable rates and provides the education, years of practice, and experience of the
18 three attorneys. (Dkt. No. 435.)

19 AIF also argues that Ross's declaration lacks credibility because while Ross

20 _____
21 ⁵Plaintiff also presents attorney fee awards in other districts in California;
22 however, those cases are not considered the relevant community for purposes of a
reasonable hourly rate and not helpful to the Court. See Camacho, 523 F.3d at 979.

23 ⁶AIF also cites to a billing survey conducted by ALM Media Properties LLC
24 regarding rates being charged by the largest firms across the United States. (Dkt. No.
25 442-1, Walker Decl. ¶ 5; Dkt. No. 442-5, Walker Decl., Ex. D.) AIF alleges that the
26 survey reveals that the average billing rates charged in the San Diego law firm of Luce,
27 Forward, Hamilton & Scripps in 2010 was \$510 for partners and \$345 for associates.
28 First, AIF has not cited to any cases that utilize the ALM survey to support a
reasonable hourly rate. Second, one firm's billing rates do not provide an analysis of
determining a reasonable hourly rate. The court is to consider prevailing rates in the
community for similar services of lawyers of reasonably comparable skill and
reputation. The ALM survey does not provide such an analysis. Thus, AIF's reliance
on the survey is misplaced. Moreover, the Court notes that, in the survey, a partner's
hourly rate ranged from \$670/hr to \$350/hr which can support Brighton's rates based
on the education, years of practice and experience of its attorneys.

1 states that Schreiber's time was charged at \$400 per hour, the actual billing statements
 2 show that his rate was charged at \$550 per hour. In its reply, Brighton states that while
 3 Scheibe is typically billed at a higher rate, his rate was re-calculated and the \$400 per
 4 hour rates applied to all Scheibe's time. (Dkt. No. 435-2, Ross Decl., Ex. 4) A look
 5 at the billing records reveals that Scheibe's rate was billed at \$400 per hour. Therefore,
 6 AIF's argument is without merit.

7 As to the paralegal rate, Brighton states it billed \$180/hour. AIF argues and to
 8 which Brighton does not respond, that Plaintiff has not provided satisfactory evidence
 9 of the prevailing market rate for paralegals in this district to be \$180 per hour. Plaintiff
 10 has failed to establish that the paralegal rate sought is prevailing rate in the Southern
 11 District of California. As such, the Court conducted an independent review; however,
 12 with the absence of any evidence as to the background and experience of the paralegal,
 13 the Court was unable to determine the prevailing rate. See J&J Sports Prods., Inc. v.
 14 Diaz, 12cv1106-W(WMC), 2014 WL 1600335, at *3 (S.D. Cal. Apr. 18, 2014). In
 15 Brighton Collectibles, Inc. v. Coldwater Creek Inc., 2009 WL 160235, at *4, the court
 16 concluded that \$90 to \$210 per hour was reasonable for paralegal work. However, \$90
 17 to \$210 per hour is a wide range depending on the education, skill and experience of
 18 the paralegal. Therefore, since no facts were presented as to the paralegal hourly rate,
 19 the Court DENIES the motion for fees as to paralegals.

20 In sum, the Court concludes that Plaintiff's counsels' hourly rates are reasonable
 21 but the paralegal hourly rate is not. Accordingly, the paralegal total hours of 253.50
 22 which total **\$87,345.00** shall be excluded.

23 **2. Hours Reasonably Expended**

24 The moving party bears the burden of documenting the appropriate hours spent
 25 in the litigation and submit evidence in support of the hours worked. Hensley, 461
 26 U.S. at 433. Counsel should exclude hours that are "excessive, redundant or otherwise
 27 unnecessary." Id. at 434. The Court should decrease the hours that were not
 28 "reasonably expended." Id. The opposing party must provide "submission of evidence

1 to the district court challenging the accuracy and reasonableness of the hours charged
 2 or the facts asserted by the prevailing party in its submitted affidavits.” Gates, 987
 3 F.2d at 1397-98 (citing Blum v. Stenson, 465 U.S. 886, 892 n. 5 (1984)); McGrath v.
 4 County of Nevada, 67 F.3d 248, 255 (9th Cir. 1995) (citations omitted) (there must be
 5 evidence to challenge the accuracy and reasonableness of the hours charged). The
 6 party opposing fees must specifically identify defects or deficiencies in the hours
 7 requested; conclusory and unsubstantiated objections are insufficient to warrant a
 8 reduction in fees. Cancio v. Fin. Credit Network, Inc., No. C04-03755 THE, 2005 WL
 9 1629809, at *3 (N.D. Cal. July 6, 2005).

10 Even if the opposing party has not objected to the time billed, the district court
 11 “may not uncritically accept a fee request,” but is obligated to review the time billed
 12 and assess whether it is reasonable in light of the work performed and the context of
 13 the case. Common Cause v. Jones, 235 F. Supp. 2d 1076, 1079 (C.D. Cal. 2002)
 14 (citing Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984)); see also
 15 McGrath, 67 F.3d at 254 n.5 (noting that court may not adopt prevailing party’s
 16 representations without conducting an independent review of the fee application).

17 When the district court makes its award, it must provide a “concise but clear”
 18 explanation of its reasons. Hensley, 461 U.S. at 437. It does not require the court to
 19 rule on each of defendants’ specific objections; however, it requires the court to
 20 provide some indication of how it arrived at the amount of fees to allow for meaningful
 21 appellate review. Gates, 987 F.2d at 1398, 1400.

22 In a declaration, Plaintiff’s attorneys conducted a detailed review and analysis
 23 of each billing statement. As part of that review, the attorneys evaluated which tasks
 24 “would have been undertaken by BGR even if AIF had been the lone defendant versus
 25 which tasks were undertaken solely because of Brighton’s claims against other
 26 defendants.” (Dkt. No. 435, Ross Decl. ¶ 10.) It divided the billing statements into the
 27 following four categories:

28 Category 1: Entries that relate solely to BGR’s [Browne George Ross
 LLP] work on Brighton’s claims against AIF These entries were

1 marked with a star.

2 Category 2: Entries that relate to BGR's work on tasks that applied to
3 Brighton's claims against multiple defendants – e.g., draft amended
4 complaint, attend mandatory settlement conference, prepare exhibit list
5 – where the amount of time spent by BGR would not have changed
6 even if AIF had been the lone defendant. These entries were marked
7 with a square.

8 Category 3: Entries that relate to BGR's work on tasks that applied to
9 Brighton's claims against multiple defendants, but the amount of time
10 incurred by BGR would have been less if AIF had been the lone
11 defendant. These entries were marked with a triangle.

12 Category 4: Entries that relate to BGR's work on tasks that applied
13 exclusively to Brighton's claims against defendants other than AIF
14 –e.g., respond to Joy Max interrogatories, deposition of YK expert,
15 meet and confer with Texas Leather counsel on discovery. These
16 entries have no notations.

17 (Dkt. No. 435, Ross Decl. ¶ 10.)

18 Entries in categories 1 and 2 were included as actually billed, and no entries in
19 category 4 were included. For entries in category 3, the attorneys estimated the amount
20 of time it would have expended on those tasks had AIF been the lone defendant. The
21 attorneys made that estimate based on their experience in this case and others. They
22 state they erred on the side of underestimation. (Id. ¶ 11.)

23 Brighton was also represented in this matter by local counsel, Winton Law
24 Corporation, and its outside general counsel, Law Offices of Gary Freedman. Although
25 both of those firms played unique, important roles and billed significant amounts for
26 work related to this litigation, Brighton has voluntarily excluded those amounts from
27 its fee request. (Id. ¶ 14.) As a result, Brighton seeks attorney hours of 1,562 for a
28 total of \$721,532.50. (Dkt. No. 435, Ross Decl., Ex. 4.)

29 AIF opposes contending that Brighton did not properly apportion time especially
30 taking into consideration that there were five other defendants and several causes of
31 action were alleged against the other five. As to AIF, only one cause of action for
32 copyright infringement was alleged against it. Moreover, AIF argues that the
33 apportionment conducted by Brighton was arbitrary.

34 In support of its opposition, AIF provides charts, of different scenarios, to

1 challenge the accuracy and reasonableness of the hours charged. First, AIF contends
2 that Brighton failed to limit its request to attorneys' fees actually and reasonably
3 incurred against AIF only. Exhibit F to the Walker Declaration includes fees expended
4 on prosecuting Plaintiff's claim against AIF only prior to trial and after trial once the
5 remaining defendants had all settled with Brighton. (Dkt. No. 442-7, Walker Decl., Ex.
6 F.) These entries total \$142,143.12. A review of the chart reveals that most of the fees
7 were incurred in the latter half of 2013 and through June 30, 2014, with six entries in
8 2012, and three entries in 2011 with the first entry dated April 28, 2011. AIF fails to
9 understand the legal standard to determine attorneys' fees in a multi-defendant case.
10 This case began in 2010 and involved work through extensive discovery, including
11 expert discovery, motions and eventually trial. Exhibits F fails to consider work done
12 in conjunction with other defendants which would have required work even if AIF had
13 been the lone defendant. Exhibit F is not a proper apportionment for the Court to
14 consider.

15 AIF also presents Exhibit H where it contends that these entries are marked with
16 a star relating to entries relating to AIF where apportionment was conducted; however
17 according to AIF, no apportionment was done. (Dkt. No. 442-9, Walker Decl., Ex. H.)
18 A review of Exhibit H reveals that these entries are not star entries but the majority are
19 square entries where these entries were not apportioned because work conducted would
20 have been the same even if AIF was the sole defendant. Therefore, no apportionment
21 was conducted. AIF also alleges that Exhibit H shows that there are numerous specific
22 instances of unrelated charges to the prosecution of Brighton's copyright claims against
23 AIF. Many of the entries in Exhibit H concern discovery as to Texas Leather which
24 would have been required if AIF had been the only defendant since Texas Leather was
25 a customer of AIF. Furthermore, summary judgment and Daubert motions were also
26 included in the entries since AIF joined in these motions. (Dkt. Nos. 166, 175.) The
27 Court notes that the 7/27/12 entry by KJW re: opposition to motion to exclude surveys
28 re secondary meaning was already excluded. (Dkt. No. 435-2 at 119.) As to the

1 5/11/12, 5/14/12, 5/15/12, and 6/8/12 depositions of Fraser (sic), Lambert, and Paret,
 2 AIF alleges these experts address issues unrelated to AIF. Brighton does not address
 3 this allegation in its reply. Without any reference to the record in this case to the
 4 contrary, the Court excludes these fees which total **\$13,593.75**.

5 Exhibit G allegedly represents an apportionment where all non-AIF billing have
 6 been equally divided by the number of defendants as to which common tasks were
 7 performed. Such an apportionment results in a total fee request of \$291,885.24. (Dkt.
 8 No. 442-8, Walker Decl., Ex. G.) After a review of the chart, the Court is unable to
 9 determine how the calculations were made. AIF has not provided the mathematical
 10 calculation as to how it determined “Hours Which Should Have Been Allocated to
 11 AIF.” (*Id.*) Therefore, the Court cannot make a determination as to Exhibit G.

12 Exhibit I includes examples of arbitrary apportionment where AIF is not listed
 13 in the entry description but the majority of the time was apportioned to AIF. Generally,
 14 the court “should defer to the winning lawyer’s professional judgment as to how much
 15 time he was required to spend on the case.” Moreno v. City of Sacramento, 534 F.3d
 16 1106, 1112 (9th Cir. 2008). An attorney’s sworn testimony concerning the amount of
 17 time required to perform a task is given considerable weight. Hunter v. County of
 18 Sacramento, No. 2:06-cv-00457-GEB-EFG, 2013 WL 55971347, at *6 (E.D. Cal. Oct.
 19 11, 2013). For courts to deny compensation for a task, “it must appear that the time
 20 claimed is obviously and convincingly excessive under the circumstances.” Hiken v.
 21 Dept. of Def., No. C 06–02812 JW, 2012 WL 3686747, at *7 (N.D. Cal. Aug. 21,
 22 2012). A review of these entries reveals that the apportionment was proper. For
 23 example, AIF challenges that the apportioning of 2.25 hours out of 4.5 hours to prepare
 24 for the hearing on the motion for summary judgement and the 10 out of the 13 hours
 25 apportioned to AIF concerning Plaintiff’s counsel’s attendance at a settlement
 26 conference which included travel time from Los Angeles. The Court does not find
 27 these amounts apportioned to be excessive. As to entries concerning discovery, these
 28 entries are difficult to apportion since they involve multiple defendants and a common

1 core of facts. See Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A, Inc., 915 F. Supp.
2 2d 1179, 1189 (D. Nev. 2013) (discovery, in particular, is not amenable to
3 apportionment because the factual predicate for the various claims are based on a
4 common core of facts.)

5 AIF explains that Exhibit J contains a list of vague and nebulous entries which
6 provide general descriptions such as “review and analyze issues”, “review documents”,
7 and “prepare for trial.” Therefore, AIF argues that it cannot determine what tasks are
8 attributable to AIF and what tasks are attributable to the other five defendants. None
9 of these were apportioned as Brighton categorized these as times which would have
10 charged even if AIF had been the lone defendant. AIF asks the Court to exclude all
11 these entries.

12 After the Court’s review of Exhibit J, the Court concludes that these entries are
13 vague and does not allow the Court to determine which defendant or specific issues the
14 attorney has worked on. See Ravet v. Stern, 07cv31-JLS(CAB), 2010 WL 3076290,
15 at 7 (S.D. Cal. Aug. 6, 2010). While there are many entries in the billing records listing
16 research regarding oppositions to the motions for summary judgment and apportioning
17 them based on content, the ones in Exhibit J fail to provide any information as to which
18 defendant or topic it applies to. The total fees for these entries equal \$80,151.25.
19 However, \$1,620.00 are attributable to paralegal fees which have already been
20 deducted above. Therefore, the Court deducts **\$78,531.25** from the fee award.

21 AIF also argues that the motion for attorneys’ fees does not account for the six
22 copyright infringement claims where AIF prevailed. Brighton argues that the time
23 spent litigating the three copyright claims that were voluntarily dismissed and the three
24 copyright claims on which the jury found no liability were inextricably intertwined
25 with the time spent on the 11 copyrights on which Brighton prevailed. Therefore, no
26 apportionment was required.

27 A plaintiff may not be awarded fees for different claims for relief that are based
28 on different facts and legal theories where plaintiff did not prevail. Hensley, 461 U.S.

1 at 434-35. Apportionment is required when disproportionate time is spent against each
2 defendant in order to ensure that a “defendant is not liable for a fee award greater than
3 the actual fees incurred against that defendant.” Jones v. Espy, 10 F.3d 690, 691 (9th
4 Cir. 1993). Despite the general rule of apportionment, it might not be required if “it is
5 impossible to differentiate between work done on claims.” Gracie v. Gracie, 217 F.3d
6 1060, 1069-70 (9th Cir. 2000) (where “claims are so inextricably intertwined that even
7 an estimated adjustment would be meaningless.”) Some cases involve claims for relief
8 that involve a common core of facts or are based on related legal theories. Hensley,
9 461 U.S. at 435. In these cases, counsel’s time will be spent generally to the litigation
10 as a whole making it difficult to divide the hours spent on a claim by claim basis. Id.
11 In such a case, the court should “focus on the significance of the overall relief obtained
12 by the plaintiff in relation to the hours reasonably expended on the litigation.” Id. If
13 a plaintiff has obtained excellent result, full recovery is allowed because an
14 enhancement may be justified. Id. Therefore, just because plaintiff did not prevail on
15 every contention raised in the lawsuit, does not mean the fee award should be reduced.
16 Id. Courts must focus on the result. Id. But if plaintiff achieved only partial or limited
17 success, the lodestar amount may be excessive even if plaintiff’s claims were
18 interrelated, nonfrivolous and raised in good faith. Id. at 436. “[T]he most critical
19 factor is the degree of success obtained.” Id. at 436. Moreover, the United States
20 Supreme Court has rejected a mathematical approach based on the total number of
21 issues a party prevails in a case. See id. at 435 n. 11 (rejecting mathematical approach
22 comparing the total number of issues in the case with those actually prevailed upon
23 because it provided little guidance in determining what is a reasonable fee in light of
24 all the relevant factors).

25 In this case, only one cause of action of copyright infringement was alleged
26 against AIF. In that copyright infringement cause of action, Brighton alleged that 51
27 of AIF’s designs infringed fourteen of its copyrights. The jury found that thirty-nine
28 of AIF’s designs infringed eleven of Plaintiff’s valid copyrights. The jury concluded

1 that three designs did not infringe and prior to trial, the Court granted AIF's motion to
2 dismiss three additional designs for lack of prosecution. (Dkt. No. 387.)

3 While AIF seeks to apportion the award based on the number of designs that did
4 not infringe, the Court is not convinced. The jury found in favor of Brighton as to the
5 one cause of action, copyright infringement. In litigating the copyright infringement
6 cause of action, the litigation work conducted cannot be differentiated because the
7 factual issues were inextricably combined. Therefore, apportionment would be
8 difficult. Moreover, Plaintiff was successful in the results it obtained so the attorneys
9 fee award need not be deducted even if a few copyrights were found not to infringe.
10 See Hensley, 461 U.S. at 435-36. Accordingly, AIF's argument fails.

11 In a massive fee application, the court may make "across-the-board percentage
12 cuts" instead of an hour-by hour analysis of either the number of hours claimed or in
13 the final lodestar figure. Gates, 987 F.2d at 1399. However, the Court must articulate
14 a reason for choosing a particular percentage cut. Id. Courts may make a small
15 across-the-board reduction, no greater than 10 percent, based on its exercise of
16 discretion and without a more specific explanation. Moreno v. City of Sacramento, 534
17 F.3d 1106, 1112 (9th Cir. 2008). Moreover, attorneys' fee awards in copyright cases
18 depend on "equity considerations." Kamar Internat'l Inc., v. Russ Berrie and Co., Inc.,
19 752 F.2d 1326, 1331 (9th Cir. 1984) (district court did not abuse its discretion in not
20 awarding attorneys' fees because defendant did not willfully infringe Plaintiff's
21 copyrights).

22 Absent bad faith by the losing a party a § 505 attorney's fee award "presents a
23 clash between competing policy goals." DC Comics v. Pacific Pictures Corp., No.
24 10cv3633-ODW(RZx), 2013 WL 1389960, at *7 (C.D. Cal. Apr. 4, 2013) (denying
25 an award of attorneys' fee based on Fantasy factors). On the one hand, § 505 seeks to
26 compensate the prevailing party for successfully vindicating its copyright claim. On
27 the other hand, courts do not want chill legitimate advocacy by defendants. Brayton
28 Purcell LLP v. Recordon & Recordon, 487 F. Supp. 2d 1124, 1129 (N.D. Cal. 2007).

1 Resolving these contrary objectives depends on a case's equitable circumstances.
2 Twentieth Century Fox Film Corp. v. Streeter, 438 F. Supp. 2d 1065, 1074 (D. Az.
3 2006).

4 In this case, the Court finds that reducing the lodestar amount by 60% is justified
5 when considering the equities. In this case, the jury found that Defendant had infringed
6 on 11 out of 17 Brighton copyrights. Out of 51 designs, the jury found infringement
7 on 39 designs. Although Brighton's degree of success was high, it did not prevail on
8 all the copyrights and the designs. Moreover, the jury found that defendant did not
9 willfully infringe Plaintiff's copyrights. Furthermore, the parties agreed that the jury's
10 calculation of statutory damages award of \$1,050,000 was incorrect and should have
11 been \$330,000. The fact that the jury awarded \$1,000,000 in lost profits was a
12 generous one that will promote deterrence and fully compensate Plaintiff for the
13 alleged infringement. In addition to the \$1,000,000, if the Court awarded an additional
14 \$646,575.75 to Plaintiff, such an award could frighten defendants from advancing a
15 valid defense and force defendants to succumb to exorbitant settlement demands of a
16 plaintiff. Accordingly, the Court finds it appropriate to reduce the lodestar by 60% to
17 adjust for those equitable considerations.

18 Since filing its motion for attorney's fees, Brighton has expended \$17,168.75
19 through July 2014 but it does not include additional work to perform in August 2014.
20 The Court finds it appropriate to award Brighton the fees through July 2014.

21 Based on the above, the Court GRANTS in part Plaintiff's motion for attorneys'
22 fee in the amount of **\$275,799.05**. The calculation is as follow: the following amounts
23 have been excluded from the total of \$808,877.00 sought: \$87,345.00 in paralegal fees;
24 \$13,593.75 for entries re: depositions of Fraser (sic), Lambert and Paret; and
25 \$78,531.25 for vague entries. After those exclusions, the amount totals \$646,575.75.
26 The Court then reduces \$646,575.75 by 60% to get a total of \$258,630.30. The Court
27 also adds \$17,168.75 for the fees expended through July 2014. Therefore, the total
28 amount of attorneys' fees totals \$275,799.05.

1 **C. Lodestar Adjustment**

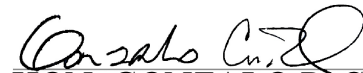
2 Neither party has raised the issue that the lodestar should be adjusted upward or
3 downward based on the Kerr factors. The Court concludes that this is not a rare and
4 exceptional case supporting an adjustment and declines to adjust based on the Kerr
5 factors. See Van Gerwen, 213 F.3d at 1045.

6 **Conclusion**

7 Based on the above, the Court GRANTS in part Brighton's motion for attorneys'
8 fees in the amount of **\$275,799.05**. The Court also GRANTS AIF's motion to file
9 documents under seal. (Dkt. No. 443.)

10 IT IS SO ORDERED.

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12 DATED: October 24, 2014

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14 HON. GONZALO P. CURIEL
15 United States District Judge
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